Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02–313 OF 2007
JAMES FOONG, LOW HOP BING AND HASAN LAH JJCA
27 JUNE 2008

Civil Procedure — Judgments and orders — Mareva order — Variation of Mareva order — Appeal against — Whether appellants made out strong case of proprietary claim against respondents — Whether High Court correct in varying Mareva order

On 1 April 2004, the ten appellants purchased RM140m worth of ABBA bonds ('the bonds'), which were issued by Pestaka Astana (M) Sdn Bhd, the first respondent. The tenure of the bonds ranged from 1½ years to 2½ years. The bonds were governed by four bond contracts: a trust deed between the first respondent and Mayban Trustees; a subscription and facility agreement between the first respondent and KAF Discounts; a deed of assignment and charge between the first respondent and Mayban Trustees; and a deed of assignment executed by the first respondent in favour of Mayban Trustees. By the trust deed Mayban Trustees were appointed as trustees for each and every bondholder. A principal term of the trust deed was, inter alia, that the first respondent opened and maintained four designated accounts, and made necessary deposits and withdrawals therefrom in accordance with the provisions of the trust deed. The first respondent also undertook not to make or grant any loan or advance to any of its directors or any other person or firm; not to open and maintain any other account other than the designated accounts and not to enter into any related transactions with any of its directors, shareholders or related corporations. The appellants alleged that the first respondent acted in breach of a fundamental term of the issuance of the bonds when it failed to open the three Shariah compliant trustee accounts with Mayban Trustees as the sole signatory. In consequence when the bond proceeds of RM140m were disbursed, they were not paid into any Shariah compliant trustee accounts operated solely by Mayban Trustees. In addition the first respondent failed to redeem the first tranche of bonds upon their maturity in the sum of RM34,202,500 and in consequence, an independent rating agency, downgraded the bonds from A+ to D. Furthermore, the first respondent had by its own admission deposited a sum of RM109m that it had received under the government contracts into an account to which Mayban Trustees were not the signatory. The first respondent also further

admitted that out of this sum it had utilised RM62m for its related companies overseas. None of the bondholders had any knowledge of any of these transactions until this point. Thereafter the appellants filed a civil suit against the first respondent and 11 others for breach of trust, breach of contract and negligence seeking, inter alia, judgment in the sum of RM157,815,000. The appellants also applied ex parte for Mareva injunctions against 10 of the 12 defendants, the Mareva defendants/respondents ('the respondents'). The High Court granted orders restraining the respondents from removing or disposing of their assets up to the value of RM157m. When the Mareva orders were set aside, the appellants appealed to the Court of Appeal which reinstated the Mareva orders. The respondents' application for leave to appeal to the Federal Court against the decision of the Court Appeal was dismissed. As a result, the Mareva orders originally granted by the High Court became in force until trial. When the respondents thereafter applied to the High Court for a variation of the Mareva orders the High Court allowed their application in its entirety. This is an appeal against that order to allow a variation of the Mareva orders. The main issues for determination in this appeal were whether the appellants from their affidavit evidence had made out a strong case of proprietary claim against the respondents and whether the High Court order to vary the Mareva order was correctly made.

Held, allowing the appeal with costs:

(1) (per **Hasan Lah JCA**, **James Foong JCA** concurring) There was no dispute that the first respondent acted in breach of its undertaking in the trust deed when it deposited the RM109m that it had received under the government contracts into an account to which Mayban Trustees were not the signatory. The first respondent also further admitted that out of this sum it had utilised RM62m for its related companies overseas and that the bondholders had no knowledge of any of these activities. Therefore when the first respondent made payments from the RM109m to the second to ninth respondents the latter had actual or constructive knowledge of the dishonesty and fraudulent conduct of the second respondent, the controlling director of the first respondent and the third to ninth respondents, in dealing with the proceeds of the government contracts. Therefore in the instant case, the money ie the RM109m belonged beneficially to the appellants as that money was to be used to redeem the bonds. As such, from the affidavit evidence the plaintiffs had shown that they have a strong case of a proprietary claim against the defendants (see paras 57–59).

(2) (per **Hasan Lah JCA**, **James Foong JCA** concurring) In addition, the first respondent had wrongfully misappropriated the proceeds from the

A government contracts and used them for the benefit of the second to ninth respondents. Under the equitable tracing rules the appellants were therefore entitled to assert their beneficial rights over the remaining money and its traceable proceeds held by the second to ninth respondents. Although the appellants in this case had not obtained
B judgment against the respondents, based on the affidavit evidence the appellants had shown a well-founded case of tracing in equity against the respondents (see para 70).

(3) (per **Hasan Lah JCA**, **James Foong JCA** concurring) In the instant case
C there was sufficient affidavit evidence to conclude that the appellants were the beneficial owners of, inter alia, the proceeds of the government contracts and would therefore suffered injustice if successful at trial because they would then have financed the expenses of the respondents. A review of the variation orders made by the High Court indicated that
D the respondents would now be permitted by the High Court to spend a sum in excess of RM10m. Moreover, according to the appellants this was not an end of the matter as the respondents would be applying for further variation orders to the High Court after that. In the light of the fact that the appellants have a well-founded proprietary claim it would
E be unconscionable to allow the respondents to continue using the trust money. Therefore the respondents' application to vary the Mareva injunction should be dismissed (see paras 81–82).

(4) (per **Low Hop Bing JCA** dissenting) The appellants are stretching the
F Mareva injunctions beyond their original purposes. Instead of preventing abuse, the appellants were using the Mareva injunction to secure payment of a judgment that was yet to be obtained in this civil suit. If the appellants had not yet proceeded to judgment against the respondents it was difficult to see why the respondents should not be
G free to use their assets to pay their debts. In any case, even if the respondents were found liable to pay the appellants as claimed it was still incumbent upon the appellants to trace and segregate the sources of the respondents monies as there had been an admixture of the respondents' existing monies and assets prior to the issuance of the
H ABBA bonds. It was incumbent upon the appellants to show cogent evidence that the respondents' monies were held on trust for the appellants' benefit and that the monies and assets in the name of the respondents belonged to the appellants. However, in this respect the appellants had not even applied for summary judgment thereby tacitly
I admitting that their claim was subject to triable issues (see paras 24–28 & 61).

(5) (per **Low Hop Bing JCA** dissenting) The Mareva injunction being an equitable remedy is not intended to be used as an instrument of oppression. It was abundantly clear that the variations ordered by the

High Court were essentially to permit the respondents to pay their legitimate and bona fide debts and obligations. As such they were completely consistent with the judicial principles and the High Court had not committed an appealable error. Thus the variation orders made by the High Court were correct (see paras 41–42).

[Bahasa Malaysia summary

Pada 1 April 2004, sepuluh perayu telah membeli sebanyak RM140j bon-bon ABBA ('bon-bon tersebut'), yang dikeluarkan oleh Pestaka Astana (M) Sdn Bhd, responden pertama. Tempoh bon-bon tersebut adalah antara 1½ tahun hingga 2½ tahun. Bon-bon tersebut dikawal oleh empat kontrak bon: surat ikatan amanah antara responden pertama dan Mayban Trustees; perjanjian yuran dan kemudahan antara responden pertama dan KAF Discounts; surat ikatan penyerahan hak dan gadaian antara responden pertama dan Mayban Trustees; dan surat ikatan penyerah hak yang disempurnakan oleh responden pertama bagi pihak Mayban Trustees. Melalui surat ikatan amanah Mayban Trustees telah dilantik sebagai pemegang amanah untuk setiap dan semua pemegang bon. Terma utama surat ikatan amanah adalah, antara lain, bahawa responden pertama membuka dan mengendalikan empat akaun yang dinamakan, dan membuat deposit-deposit dan pengeluaran-pengeluaran yang perlu darinya menurut peruntukan-peruntukan surat ikatan amanah itu. Responden pertama juga berjanji untuk tidak membuat atau memberikan apa-apa pinjaman atau pendahuluan kepada mana-mana pengarahnya atau individu atau firma lain; tidak membuka dan mengendalikan apa-apa akaun lain selain daripada akaun-akaun yang dinamakan dan tidak memasuki apa-apa transaksi berkaitan dengan mana-mana pengarah, pemegang saham atau syarikatnya. Perayu-perayu mengatakan bahawa responden pertama telah bertindak melanggar terma penting tentang pengeluaran bon-bon tersebut apabila ia gagal untuk membuka tiga akaun amanah menurut Syariah dengan Mayban Trustees sebagai penandatangan tunggal. Apabila hasil kutipan bon sebanyak RM140j dibayar, ia tidak dibayar ke dalam mana-mana akaun amanah menurut Syariah yang hanya dijalankan oleh Mayban Trustees. Tambahan pula responden pertama telah gagal untuk menebus tranche pertama bon-bon setelah ia matang sejumlah RM34,202,500 dan akibatnya, agensi perkadaran bebas, telah menurunkan kadar bon-bon tersebut daripada A+ kepada D. Tambahan pula, responden pertama melalui pengakuannya sendiri telah mendepositkan sejumlah RM109j yang ia telah terima di bawah kontrak-kontrak kerajaan ke dalam akaun di mana Mayban Trustees bukan penandatangan. Responden pertama juga seterusnya mengakui bahawa daripada jumlah ini ia telah menggunakan sejumlah RM62j untuk syarikat-syarikat luar negaranya yang berkaitan. Tiada antara pemegang bon yang mempunyai pengetahuan tentang mana-mana transaksi tersebut

A sehingga kini. Selepas itu perayu-perayu telah memfailkan guaman sivil terhadap responden pertama dan 11 yang lain kerana melanggar amanah, melanggar kontrak dan cuai dengan memohon, antara lain, penghakiman sejumlah RM157,815,000. Perayu-perayu juga telah memohon injunksi-injunksi Mareva terhadap 10 daripada 12 defendan-defendan,
B defendan-defendan/responden-responden Mareva ('responden-responden'). Mahkamah Tinggi telah memberikan perintah-perintah menghalang responden-responden daripada mengalih atau menjual aset-aset mereka sehingga bernilai RM157j. Apabila perintah-perintah Mareva tersebut diketepikan, perayu-perayu telah merayu ke Mahkamah Rayuan yang telah
C menghidupkan semula perintah-perintah Mareva tersebut. Permohonan responden-responden untuk kebenaran merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan telah ditolak. Akibatnya, perintah-perintah Mareva yang pada asalnya telah diberikan oleh Mahkamah Tinggi telah berkuat kuasa sehingga perbicaraan. Apabila
D responden-responden kemudiannya memohon ke Mahkamah Tinggi untuk mengubah perintah-perintah Mareva Mahkamah Tinggi telah membenarkan permohonan mereka secara keseluruhan. Ini adalah rayuan terhadap perintah tersebut untuk membenarkan perintah-perintah Mareva diubah. Isu utama untuk ditentukan dalam rayuan ini adalah sama ada perayu-perayu
E berdasarkan keterangan afidavit mereka telah menunjukkan kes yang kukuh untuk tuntutan tuan empunya terhadap responden-responden dan sama ada perintah Mahkamah Tinggi untuk mengubah perintah Mareva telah dibuat dengan betul.

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Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Hasan Lah HMR**, **James Foong HMR** bersetuju) Tidak dipertikaikan bahawa responden pertama telah bertindak melanggar
G aku janjinya dalam surat ikatan amanah apabila ia mendepositkan RM109j yang diterima dibawah kontrak-kontrak kerajaan ke dalam akaun yang mana Mayban Trustees bukan penandatangan. Responden pertama juga selanjutnya telah mengakui bahawa daripada jumlah ini ia telah menggunakan RM62j untuk syarikat-syarikat luar negaranya yang
H berkaitan dan bahawa pemegang-pemegang bon tersebut tidak mengetahui tentang aktiviti-aktiviti tersebut. Oleh itu apabila responden pertama membuat bayaran daripada RM109j itu kepada responden-responden kedua hingga kesembilan, ia mempunyai pengetahuan sebenar atau konstruktif tentang ketidakjujuran dan
I perlakuan menipu responden kedua, pengarah yang berkuasa responden pertama dan responden-responden ketiga hingga kesembilan, yang menguruskan hasil kutipan kontrak-kontrak kerajaan. Oleh itu dalam kes ini, wang tersebut iaitu RM109j adalah dimiliki secara benefisiari kepada perayu-perayu kerana wang tersebut telah

digunakan untuk mendapat balik bon-bon tersebut. Oleh itu, berdasarkan keterangan afidavit plaintif-plaintif telah menunjukkan bahawa mereka mempunyai kes yang kukuh untuk tuntutan tuan empunya terhadap defendan-defendan (lihat perenggan 57–59). A

(2) (oleh **Hasan Lah HMR**, **James Foong HMR** bersetuju) Tambahan pula, responden pertama adalah salah kerana melesapkan hasil kutipan daripada kontrak-kontrak kerajaan dan menggunakannya untuk faedah responden-responden kedua hingga kesembilan. Di bawah peraturan-peraturan mengesan yang saksama perayu-perayu oleh itu berhak untuk menegaskan hak benefisiari mereka ke atas wang yang tinggal dan hasil kutipan yang boleh dikesan yang dipegang oleh responden-responden kedua hingga kesembilan. Meskipun perayu-perayu dalam kes ini tidak memperoleh penghakiman terhadap responden-responden, berdasarkan keterangan afidavit perayu-perayu telah menunjukkan penemuan kes pengesanan dalam ekuiti terhadap responden-responden (lihat perenggan 70). B C D

(3) (oleh **Hasan Lah HMR**, **James Foong HMR** bersetuju) Dalam kes ini terdapat keterangan yang mencukupi untuk memutuskan bahawa perayu-perayu adalah pemilik benefisiari, antara lain, hasil kutipan kontrak-kontrak kerajaan dan oleh itu akan mengalami ketidakadilan jika berjaya dalam perbicaraan kerana mereka mungkin telah membiayai perbelanjaan responden-responden. Kajian semula perintah-perintah perubahan yang dibuat oleh Mahkamah Tinggi menunjukkan bahawa responden-responden kini dibenarkan oleh Mahkamah Tinggi untuk membelanjakan jumlah lebihan RM10j. Tambahan pula, menurut perayu-perayu ini bukan menandakan selesainya perkara ini kerana responden-responden akan memohon perintah-perintah perubahan selanjutnya ke Mahkamah Tinggi selepas itu. Berdasarkan fakta bahawa perayu-perayu mempunyai tuntutan tuan empunya yang kukuh ia adalah tidak berpatutan untuk membenarkan responden-responden terus menggunakan wang amanah. Oleh itu permohonan responden-responden untuk mengubah injunksi Mareva patut ditolak (lihat perenggan 81–82). E F G

(4) (oleh **Low Hop Bing HMR** menentang) Perayu-perayu cuba menjangkau tujuan asal injunksi Mareva tersebut. Daripada menghalang penyalahgunaan, perayu-perayu sebaliknya menggunakan injunksi Mareva untuk menjamin bayaran penghakiman yang masih belum diperoleh dalam guaman sivil ini. Jika perayu-perayu belum mendapat penghakiman terhadap responden-responden ia adalah sukar untuk melihat kenapa responden-responden tidak patut bebas menggunakan aset-aset mereka untuk membayar hutang mereka. Dalam apa keadaan, jikapun responden-responden didapati bertanggungjawab untuk membayar perayu-perayu seperti yang H I

didakwa ia masih menjadi kewajipan ke atas perayu-perayu untuk mengesan dan mengasingkan wang responden-responden kerana berlaku campuran terhadap wang responden-responden yang sedia ada dan aset-aset sebelum pengeluaran bon-bon ABBA. Adalah wajib untuk perayu-perayu menunjukkan keterangan yang meyakinkan bahawa wang-responden-responden dipegang secara amanah untuk faedah perayu-perayu dan bahawa wang dan aset-aset dalam nama responden-responden adalah milik perayu-perayu. Walau bagaimanapun, dalam hal ini perayu-perayu tidak langsung memohon penghakiman terus dan dengan itu tanpa bertulis telah mengakui bahawa tuntutan mereka adalah tertakluk kepada isu-isu yang perlu dibicarakan (lihat perenggan 24–28 & 61).

(5) (oleh **Low Hop Bing HMR** menentang) Injunksi Mareva yang merupakan remedi ekuiti tidak bermaksud untuk digunakan sebagai alat penindasan. Adalah jelas bahawa perubahan-perubahan yang diperintahkan oleh Mahkamah Tinggi adalah penting untuk membenarkan responden-responden membayar hutang-hutang sah dan bona fide dan kewajipan-kewajipan mereka. Oleh itu perintah-perintah perubahan adalah konsisten dengan prinsip-prinsip kehakiman dan Mahkamah Tinggi tidak melakukan kesilapan rayuan. Oleh itu perintah-perintah perubahan yang dibuat oleh Mahkamah Tinggi adalah betul (lihat perenggan 41–42).]

Notes

For cases on judgments and orders generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4017–4288.

Cases referred to

Ace King Pte Ltd v Circus Americano Ltd & Ors [1985] 2 MLJ 75 (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1990] 3 MLJ 481 (refd)

Barclays Bank Plc v G Thorpe, R Thorpe and Chase Manhattan Bank NA [1995] JLR 184 (refd)

Foskett v McKeown [2001] 1 AC 102 (refd)

Iraqi Ministry of Defence & Ors v Arcepey Shipping Co SA & Anor [1980] 2 WLR 488 (refd)

Kayford Ltd, Re [1975] 1 All ER 604 (refd)

Labtec Sdn Bhd v Resilient Construction Sdn Bhd (Syarikat Telekom Malaysia Bhd, third party; Perangsang Aluminium Sdn Bhd, intervener) [1992] 2 MLJ 853 (refd)

Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors [1997] 5 MLJ 77; [1997] 5 CLJ 307 (refd)

Law Society v Shanks The Times, 19 October 1987 (refd)
Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605 (refd)
PCW (Underwriting Agencies) Ltd v Dixon [1983] 2 All ER 158 (refd)
Polly Peck International Plc v Asil Nadir & Ors [1992] 2 Lloyd's Rep 238 (refd)
Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378 (refd)
Royal Global Exports Pte Ltd & Ors v Good Stream Co Ltd & Anor [2004] 4 SLR 247 (refd)
S & F International Ltd v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 (refd)
SCF Finance v Masri [1985] 1 WLR 876 (refd)
Sundt Wrigley & Co Ltd v Wrigley [1993] CA Transcript 685 (refd)
United Mizrahi Bank Ltd v Doherty & Ors [1998] 2 All ER 230 (refd)
Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors [2003] 5 MLJ 233 (refd)

Appeal from: Civil Suit No D6(D8)–22–1810 of 2005 (High Court, Kuala Lumpur)

Tommy Thomas (Tommy Thomas) for the appellant.
Lim Kian Leong (Lim Kian Leong & Co) for the respondents/Mareva defendants.

Low Hop Bing JCA (delivering dissenting judgment):

APPEAL

[1] This is the appellants' ('the plaintiffs') appeal against the variations ordered by the High Court on 4 April 2007. The variations were made to Mareva injunctions which restrained some of the respondents ('the Mareva defendants') from dissipating their assets pending trial of the civil suit there.

[2] The relevant factual background is set out below.

BONDS

[3] On 1 April 2004, the first defendant, Pesaka Astana Sdn Bhd ('Pesaka') issued RM140m worth of ABBA bonds ('the bonds') which were purchased by all the ten plaintiffs. The amount and tenure of the bonds ranged from 1½ years to 2½ years, the particulars of which are:

	Amount	Maturity Date
1	RM30m	30 September 2005
2	RM50m	30 March 2006
3	RM60m	30 September 2006

[4] The plaintiffs alleged that:

(1) Pesaka failed to redeem any of the bonds on the respective maturity dates;

(2) Pesaka was obliged to pay the plaintiffs the total redemption sum of RM157,815,000 payable under the Shariah compliant bonds;

(3) by a proposed debt restructuring scheme dated 22 December 2005, on behalf of Pesaka, BDO Capital agreed to repay monies due and payable to the plaintiffs, by way of a five-year instalment period;

(4) four designated accounts were to be opened by Pesaka prior to its issuance of the bonds;

(5) pursuant to the terms of bond contracts, Pesaka was not to open and maintain any other bank account apart from the four designated accounts which are also to be Shariah compliant;

(6) three out of the four designated accounts had to be operated at all times by Mayban Trustees as the sole signatory ('the trustee accounts') while Pesaka was to operate the fourth account; and

(7) the bonds were designed to provide comfort and protection to the bondholders, by ensuring that the proceeds of government contracts (which Pesaka was going to receive and which were earmarked as the principal sources of funds for the redemption of the bonds by Pesaka) would be paid into, and maintained, at one of the Trustee Accounts ie the 'Revenue Account', operated solely by Mayban Trustees as 'ring-fencing'.

BOND CONTRACTS

[5] The plaintiffs claimed that on 9 March 2004, three contracts, (1) to (3) below, were executed, while the fourth contract, (4) below, was executed on 1 April 2004. These four bond contracts are:

(1) trust deed, entered into between Pesaka and Mayban Trustees, the second defendant;

(2) subscription and facility agreement, entered into between Pesaka and KAF Discounts, the third defendant;

(3) deed of assignment and charge, entered into between Pesaka and Mayban Trustees, the second defendant; and

(4) deed of assignment, executed by Pesaka in favour of the second defendant, Mayban Trustees.

[6] The plaintiffs' case is that the bonds are governed by the four bond contracts executed prior to the issuance and sale of the bonds. None of the bondholders are parties thereto.

[7] The principal terms of the trust deed are:

(1) Mayban Trustees shall be appointed trustee for each and every bondholder: cl 2.1;

(2) The bonds are Pesaka's direct, secured and unconditional obligations: cl 3.1(a);

(3) The trust deed binds all bondholders, present and future, and the bonds are issued subject to the trust deed: cl 3.1(b);

(4) By way of a positive undertaking, Pesaka shall open and maintain four designated accounts, and make the necessary deposits into and withdraw payments therefrom only in accordance with the provisions of trust deed: cl 7.1(w); and deposit into the finance service reserve account, one of the four designated accounts, the minimum required balance to be applied towards the payment of any monies due and owing under the bonds: cl 8.3

(5) By way of negative undertakings, Pesaka shall not:

(i) make or grant any loan or advance to any of its directors or any other person, firm or organisation;

(ii) open and maintain other account except the four designated accounts; and

(iii) enter into any related transaction with any of its directors, shareholders or related corporations.

[Clause 7.2(h), (m) and (q) respectively]

(6) Mayban Trustees shall be the sole signatory to the disbursement, revenue and finance service reserve accounts, while Pesaka shall be the signatory to the operating account: cl 8;

(7) all proceeds from three contracts entered into between Pesaka and the Government of Malaysia ('the government contracts') shall be deposited into the revenue account: cl 8.2(a)(i); and

(8) monies in the revenue account shall be applied to redeem the bonds: cl 8.2(b)(iii).

[8] By the terms of the deed of assignment and charge, and by the deed of assignment executed by Pesaka in favour of Mayban Trustees, Pesaka had assigned absolutely to Mayban Trustees, as security for payment of the redemption monies of the bonds, all Pesaka's rights, present and future, under the government contracts. Pesaka also created a charge in favour of Mayban Trustees.

THE ACCOUNTS

[9] The plaintiffs alleged that:

(1) A fundamental term of the issuance of the bonds is the opening and operating of the three Shariah compliant trustee accounts, with Mayban Trustees as sole signatory at all times, into which trust monies would be deposited and, in the case of the revenue accounts, to be ear-marked and designated for the purpose of redeeming the bonds upon their maturity;

(2) Pesaka failed to open the three Shariah compliant trustee accounts with Mayban Trustees as sole signatory;

(3) On 1 April 2004, when the proceeds of the bonds were disbursed by KAF Discounts ie the third defendant, the bond proceeds were not paid into any of the Shariah compliant trustee accounts, but instead were, at Pesaka's instructions, paid to various accounts which were neither Shariah compliant nor operated by Mayban Trustees as the sole signatory; and

(4) Pesaka converted three of its pre-existing corporate accounts into which the bond proceeds were credited, and Mayban Trustees was not the signatory thereto. At the material time, none of the bondholders had any knowledge that the bond proceeds of RM140m had not been deposited into the trustee accounts.

DEFAULT BY PESAKA

[10] The plaintiffs claimed that:

(1) On 30 September 2005, upon their maturity, Pesaka failed to redeem the first tranche of bonds in the sum of RM34,202,500, as a result of which, MARC, an independent rating agency, down-graded the bonds from A+ to D;

(2) By letter dated 30 September 2005, Mayban Trustees declared an event of default on the part of Pesaka, so as to render the entire indebtedness of Pesaka due and payable immediately, rather than on the respective maturity dates of the second and third tranches; and

(3) On 25 October 2005, during a meeting between the parties, Pesaka admitted and the plaintiffs discovered that under the government contracts, Pesaka had in fact received RM109m under the government contracts, which were deposited into an account to which Mayban Trustees was not the signatory; and that out of this sum, it had utilised RM62m for overseas investments in its related companies in Germany, South Korea and the United Kingdom. At the same meeting, Mayban Trustees informed the plaintiffs that it had not become the sole signatory to the trustee accounts.

MAREVA INJUNCTIONS

[11] On 14 December 2005, the plaintiffs filed the civil suit against all the 12 defendants for breach of trust, breach of contract and negligence, and sought, inter alia, judgment in the sum of RM157,815,000. The plaintiffs also applied for and obtained ex parte Mareva injunctions in the High Court against the Mareva defendants on 16 December 2005:

(1) restraining the Mareva defendants from removing or disposing of their assets up to the value of RM157m; and

(2) ordering them to affirm affidavits giving information of the nature, value and whereabouts of their assets, whether in or outside Malaysia.

[12] On 10 July 2006, the High Court set aside the ex parte Mareva injunctions. Being dissatisfied, the plaintiffs appealed vide Court of Appeal Civil Appeal No W-02–717 of 2006 which was heard on an urgent basis. On 18 December 2006, the appeal was allowed with costs, and the Mareva injunctions were reinstated. An early trial of the civil suit was ordered, with liberty to the Mareva defendants to apply to the High Court for variations thereto if necessary.

[13] On 12 January 2007, the Federal Court dismissed the Mareva defendants' application for leave to appeal to the Federal Court against the decision of the Court of Appeal reinstating the Mareva injunctions.

THE VARIATIONS

[14] On 4 April 2007, the High Court allowed the Mareva defendants' application for variations to the Mareva injunctions and permitted the following transactions and payments:

Particulars	Amount/Transaction
1. All creditors of first, sixth and twelfth Mareva defendants, on *debts due and payable*	RM8,109,983.37
2. All *recurring bills* of the first, sixth and twelfth Mareva defendants	RM857,015.88 and half yearly payment of RM39,645 and annual payment of RM34,074 until the final disposal of this suit
3. The first Mareva defendant financier	Retention of monies for current and future contracts
4. The fourth Mareva defendant creditors on all debts due and payable	RM8,261.10
5. The fourth Mareva defendant's (Rafie's) living and/or day to day expenses	RM81,437.93 (inclusive of the sum of S$9,982.68 and S$4,900 at the exchange rate of RM2.254)
6. House No 64, The Vale, London NW11, England for the fourth Mareva defendant	Monthly instalment of £3,200 on the house
7. Deduction of the fourth Mareva defendant's EPF account	RM30,000 for March 2007 and June 2007
8. The fourth Mareva defendant's sale of shares in his account with SJ Securities Sdn Bhd at market price	Remission of the proceeds of sale to the fourth Mareva defendant's account in Malaysia
9. The shares in the fourth Mareva defendant 's account with SJ Securities Sdn Bhd owned by one Salawati bt Mat Salleh	Exclusion of these shares from the fourth Mareva defendant's account
10. Legal fees for the Mareva defendants' legal actions in courts	As and when they arise
11. Miscellaneous transactions involving dealings of assets overseas	USD1m

[15] Having set out the above factual background, I shall now proceed to state the question for determination.

QUESTION FOR DETERMINATION

[16] In this appeal, the question for determination is:

> Given the above factual background and in the light of the relevant established judicial principles governing variations to Mareva injunctions, is the exercise of discretion by the High Court in ordering the variations fair, equitable and correct?

RELEVANT ESTABLISHED JUDICIAL PRINCIPLES

[17] From the plethora of authorities relied on by the parties herein, the relevant established judicial principles relating to the nature of a Mareva injunction and the variations thereto may be distilled as follows:

(1) Mareva injunction is draconian in nature. Other than non-bona fide expenses, the burden is on the Mareva plaintiff to make provisions in the Mareva injunction for the Mareva defendant's living and ordinary expenses and for payment of ordinary debts as they become due, at the time the plaintiff took out the Mareva injunction: per Lord Donaldson MR in *Law Society v Shanks* The Times, 19 October 1987 (CA), as applied by RK Nathan JC (later J) in *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77, at p 100; [1997] 5 CLJ 307, at p 331 (HC);

(2) Mareva injunction is not intended to give a plaintiff priority for his claim over the claims of other creditors of the defendant, and so it should not be used as an instrument of oppression to preclude a defendant from discharging bone fide business obligations: Poh Chu Chai, *Law of Banker and Customer* (4th Ed) at pp 482–486; *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605, at pp 612–613 (CA) per Gopal Sri Ram JCA; *Larut Consolidated Bhd & Anor*, at p 330 (HC); and *Labtec Sdn Bhd v Resilient Construction Sdn Bhd (Syarikat Telekom Malaysia Bhd, third party; Perangsang Aluminium Sdn Bhd, intervener)* [1992] 2 MLJ 853, at p 860 (HC), per Lim Beng Choon J (as he then was);

(3) A Mareva defendant cannot be required to reduce his ordinary standard of living nor be prevented from carrying on his business in the ordinary way, meeting his debts or other obligations as they become due, with a view to putting by sums to satisfy a judgment which may or may not be given in the future: per Lord Donaldson MR in *Polly Peck International Plc v Asil Nadir & Ors* [1992] 2 Lloyd's Rep 238 (CA), and Poh Chu Chai, ibid, at p 482 (footnote 175);

(4) Mareva injunction should make provision for the defendant to employ his funds to pay his legal costs or for reasonable expenses to be incurred by the defendant to defend the action brought against him, as these legal costs and expenses are bona fide business obligations: *Larut Consolidated Bhd & Anor*, at p 331 (HC); and *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (HC) per Lloyd J, and Poh Chu Chai, p 487; and

(5) A Mareva defendant is not required to justify and give special reasons whenever he applies for assets or specific funds to be released from a Mareva injunction, and whenever funds are sought to meet normal business obligations and expenses and legal costs, these should, as a matter of course, be released. All that a Mareva defendant has to show in a variation application is that the purpose for which he wishes to use the frozen assets is a purpose for which he has usually incurred and that the legal expenses that are required by him, are legitimate and reasonable: *PCW (Underwriting Agencies) Ltd* at pp 162, 164–165; Poh Chu Chai at pp 488–489; and *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75, at p 80E–F left per Zakaria Yatim J (later FCJ) applying *Iraqi Ministry of Defence & Ors v Arcepey Shipping Co SA & Anor* [1980] 2 WLR 488 at p 494.

[18] In *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481 at p 493 (HC), Zakaria Yatim J (later FCJ) allowed variations to a Mareva injunction to enable Lorrain Esme Othman to make his payment of legal expenses based on letters written by his solicitors quoting expected legal fees in respect of a habeas corpus application in Hong Kong and another case in the European Commission of Human Rights, both of which involve the question of his liberty. There was no requirement for actual invoices to be issued.

PROPRIETARY CLAIM

[19] The plaintiffs' learned counsel Mr T Thomas relied on *Barclays Bank Plc v G Thorpe, R Thorpe and Chase Manhattan Bank NA* [1995] JLR 184 to support the contention that the Mareva defendants were not entitled to vary the Mareva injunctions, as it was improper to use trust monies in the plaintiffs' proprietary claim to fund the Mareva defendants' defence or ordinary expenses.

[20] However, learned counsel Mr Lim Kian Leong submitted for the Mareva defendants that Barclays Bank, is unhelpful to the plaintiffs.

[21] In my view, the facts in *Barclays Bank*, and those in the instant appeal demonstrate the following distinguishable features:

(1) In *Barclays Bank,* there was clear evidence that the monies in the defendants' account at Chase Manhattan Bank were monies belonging to the plaintiff. However, in the instant appeal, the plaintiffs have yet to establish their alleged proprietary claim against the Mareva defendants; and

(2) In *Barclays Bank*, there was no necessity to allow any variation to the Mareva injunction, as the defendants' legal representation was not jeopardised; they were entitled to legal aid. However, in the instant appeal, legal aid is non-existent. The Mareva defendants have to seek variations and obtain legal representation in order to defend this civil suit initiated by the plaintiffs.

[22] The facts in *United Mizrahi Bank Ltd v Doherty & Ors* [1998] 2 All ER 230, another case cited for the plaintiffs, clearly militate against the plaintiffs' contention that the Mareva defendants are not entitled to the variations. There, the English High Court had in effect allowed the defendants' allowances for living expenses and legal costs.

ARE FUNDS HELD ON TRUST FOR THE PLAINTIFFS?

[23] It was submitted for the plaintiffs that the Mareva defendants' funds were held on trust for the plaintiffs.

[24] The Mareva defendants countenanced that the plaintiffs have jumped the gun by concluding that they are entitled to the Mareva defendants' funds for the purpose of avoiding the tracing process which they had prayed for in the civil suit but has yet to be decided on by the court.

[25] In my view, the plaintiffs are stretching the Mareva injunctions beyond their original purposes. Instead of preventing abuse, the plaintiffs are using the Mareva injunctions to secure payment of a judgment that has not been obtained in the civil suit. It is to be noted that the Mareva defendants did not operate their businesses from scrap with the funds raised solely from the bonds. They already had ongoing businesses before the bonds were created. Even if subsequently the Mareva defendants were found to be liable to pay the plaintiffs as claimed and those monies emanated from the bonds with the revenue thereon adjudged as being held on trust for the plaintiffs, it is still incumbent on the plaintiffs to trace and segregate the sources of the Mareva defendants' monies, as there has been an admixture of the Mareva defendants' existing monies and assets prior to the issuance of bonds.

[26] In *SCF Finance v Masri* [1985] 1 WLR 876, at p 884, the English Court of Appeal set down certain guidelines for the purpose of determining a dispute on whether the assets sought in the Mareva injunction belong to the defendant. One important guideline is to the effect that where a plaintiff invites the court to conclude within the scope of a Mareva injunction assets which appear on their face to belong to a third party, eg a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the

A defendant. This guideline was adopted in *Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors* [2003] 5 MLJ 233; *Malaysian High Court Practice 2007* Lexis Nexis, Vol 1, p 1330, para 29.1.6A.

B **[27]** I apply the above guideline to the instant appeal. It is incumbent on the plaintiffs to show cogent evidence that:

(1) the Mareva defendants' monies are held on trust for the plaintiffs' benefit; and

C (2) the monies and assets in the name of the Mareva defendants are the monies and assets belonging to the plaintiffs.

[28] In this respect, the plaintiffs have not even applied for summary judgment, implying that the plaintiffs have tacitly admitted that their claim is subject to triable issues.

D

SUFFICIENCY OF FUNDS

[29] The plaintiffs argued that the Mareva defendants do not have sufficient funds in their bank accounts and fixed deposits to pay the amounts E sought to be varied.

[30] The Mareva defendants responded that the plaintiffs' submission is an attempt to mislead the court.

F

[31] In my judgment, the plaintiffs have failed to take into account the Mareva defendants' assets and ongoing businesses as sources of funding, despite the same having been disclosed by the Mareva defendants when computing their current funds.

G

[32] Further, the effect of the Mareva injunctions obtained by the plaintiffs is 'worldwide' and the proceeds of sale, if any, will still be caught by the injunctions even if the same were to be remitted to the Mareva defendants outside the territorial jurisdiction of Malaysia.

H

[33] The Mareva defendants' payments of monies and utilisation of funds pursuant to the variations will be in the interest of the Mareva defendants in as much as it is to the plaintiffs, since the purposes of the payments and transactions are to protect the Mareva defendants from action by legitimate I creditors and hence to generate business.

NEGLECT TO PAY DEBTS

[34] The plaintiffs contended that the Mareva defendants have neglected to pay debts during the period when the Mareva injunctions were lifted.

[35] The defendants refuted that the funds allowed under the ex parte Mareva injunctions were limited.

[36] In my view, the limited funds allowed under the ex parte Mareva injunctions amounted to approximately RM400,000, although the Mareva defendants required some RM740,000 monthly for seven months from 16 December 2006 to 10 July 2007. As a consequence, the Mareva defendants were only able to settle urgent payments to ensure that they were up and running. The Mareva defendants had held back as many creditors as practically possible to avoid any breach of the ex parte Mareva injunctions.

[37] When the ex parte Mareva injunctions were lifted for five months, the backlog of debts and the problems caused to the Mareva defendants' business prior thereto, made it impractical for the Mareva defendants to repay each and every creditor within such a short period. They were indeed negotiating in stages for settlement with various creditors. The serious disruption to the Mareva defendants' businesses was such that their ability to meet the above debts was adversely affected.

CONTINGENT LIABILITIES AND PREFERENTIAL PAYMENTS

[38] The plaintiffs submitted that the variations permitted payment of contingent liability in addition to preferential payments favouring the Mareva defendants' creditors.

[39] However, the Mareva defendants derived support from documents, annexed to the affidavit in support of the variations, as evidence of the due date for payments.

[40] In my judgment, the plaintiffs' submission is premature as they have yet to obtain a judgment on their claim in the civil suit. The absence of a judgment against the Mareva defendants clearly runs counter to the plaintiffs' above contention. It is singularly significant to refer to the decision of Goff J in *Iraqi Ministry of Defence*, at pp 636–637. The principles enunciated therein may be stated as follows:

(1) It is difficult to see why, if a plaintiff has not yet proceeded to judgment against a defendant but is simply a claimant for an unliquidated sum, the defendant should not be free to use his assets to pay his debts;

(2) If the plaintiff should obtain a judgment against a defendant company, and the defendant company should be wound up, its previous payments may thereafter be attacked on the ground of fraudulent preference, but this is an entirely different matter which should be dealt with at the stage of winding up;

(3) It is not to be forgotten that the plaintiff's claim may fail, or the damages which he claims may prove to be inflated;

(4) A plaintiff, merely by establishing a prima facie case, is not to preclude the bona fide payment of the defendant's debts; and

(5) It does not make commercial sense that a party should, without himself proceeding to judgment, prevent the defendant from using his assets to satisfy his debts as they fall due and be put in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and commercial standing.

(see also Poh Chu Chai at pp 483–484; *Royal Global Exports Pte Ltd & Ors v Good Stream Co Ltd & Anor* [2004] 4 SLR 247, at pp 248–250 and 257 (HC); and *Ace King Pte Ltd* at pp 7–80 (HC)).

[41] It is abundantly clear to me that the variations ordered by the High Court are essentially to permit the Mareva defendants to pay their legitimate and bona fide debts, recurring bills, monies for current and future contracts, living expenses, instalment payments for a house in London, statutory EPF deductions, remission of proceeds of sale of shares, legal fees for defending actions in courts and miscellaneous transactions. Mareva injunction being an equitable remedy is not intended to be used as an instrument of oppression. It is plain that the variations ordered by the High Court serve the purpose of permitting the Mareva defendants to discharge their legitimate and bona fide obligations which are completely consistent with the aforesaid established judicial principles.

CONCLUSION

[42] On the foregoing grounds, I hold that the High Court has occasioned no appealable error. The answer to the above question is in the affirmative. I therefore dismiss the plaintiffs' appeal with costs. The variations ordered by the High Court are hereby affirmed. Deposit to the Mareva defendants towards account of taxed costs.

Hasan Lah JCA:

INTRODUCTION

[43] This was an appeal against the decision of the High Court at Kuala

Lumpur given on 4 April 2007 by the appellants ('the plaintiffs') whereby the High Court ordered variations of Mareva injunctions previously granted which restrained the respondents ('the first, fourth, sixth to twelfth defendants') from dissipating their assets pending trial of the civil suit. By a majority decision this court allowed the appeal by the plaintiffs with costs. By consent the variations orders relating to the sum of RM81,437.93 per month as the fourth defendant's living and day to day expenses from January 2007 until final disposal of this suit (para (e) of the order) and the payment of legal fees involving the defendants (para (j) of the order) were allowed to stand. I now give my reasons for allowing the appeal.

BACKGROUND

[44] On 14 December 2005 the plaintiffs filed a civil suit, which is the subject matter of this appeal, against the 12 defendants seeking, inter alia, judgment in the sum of RM157,815,000. The causes of action relied upon by the plaintiffs include breach of trust, breach of contract and negligence. The plaintiffs also applied 'ex parte' for Mareva injunctions against ten of the 12 defendants.

[45] On 16 December 2005, the High Court (Wahab Said J) granted orders restraining ten of the 12 defendants ('the Mareva defendants') from removing or disposing off their assets up to the value of RM157m. The Mareva defendants were also ordered to affirm affidavits giving information of the nature, value and whereabouts of their assets, whether in or outside Malaysia. That order, inter alia, states:

(1) that the first and the fourth to twelfth defendants, whether by themselves, their servants, agents or otherwise howsoever, are and be restrained from:

(a) removing from Malaysia any of their assets which are in Malaysia, whether in their own name or not and whether solely or jointly owned, up to the value of RM157m;

(b) in any way disposing of or dealing with or diminishing the value of any of their assets, whether they are in or outside Malaysia, whether in their own name or not and whether solely or jointly owned, up to the value of RM157m,

including the following assets in particular:

(i) all monies held in the accounts of the said defendants in all banks and other financial institutions in Malaysia; and

(ii) all monies held in the accounts of the said defendants in all banks and other financial institutions outside Malaysia.

[46] On 10 July 2006, the High Court (Siti Mariah J) set aside the Mareva orders. Being dissatisfied with her decision the plaintiffs appealed to the Court of Appeal.

[47] The plaintiffs' appeal under Civil Appeal No W-02–717 of 2006 was heard on an urgent basis by the Court of Appeal which, on 18 December 2006, allowed the appeal with costs and reinstated the Mareva orders made by Wahab Said J. The Court of Appeal also ordered an early trial of the civil suit. The Mareva defendants applied for leave of the Federal Court to appeal to the Federal Court against the decision of the Court of Appeal. On 12 January 2007, the Federal Court dismissed the leave application. As a result of the decision of the Court of Appeal, the Mareva orders originally granted by Justice Wahab Said have been restored and are in force until trial.

[48] The Mareva defendants thereafter applied to the High Court for variation to the Mareva orders. On 4 April 2007, the High Court (Siti Mariah J) allowed their application in its entirety. This is the decision which is the subject matter of this appeal. The variation orders made by the High Court on 4 April 2007 (and which are the subject matter of this appeal) have the effect of:

(a) permitting the first, sixth to twelfth defendants to pay all its creditors on all debts due and payable up to the amount of RM8,109,983;

(b) permitting the first, sixth to twelfth defendants to pay all recurring bills up to the amount of RM857,015.88 and half yearly payment of RM39,645 and annual payment of RM34,074 until the final disposal of this suit;

(c) permitting the first defendant to allow their financier for current and future contracts to retain the sum secured under the facility from the proceeds of the respective contracts before transferring the remaining sum to the first defendant's account in Malaysia;

(d) permitting the fourth defendant to pay all its creditors on all debts due and payable up to the amount of RM8,261.10;

(e) permitting the fourth defendant to make withdrawal and payment up to the sum of RM81,437.93 (inclusive of the sum of S$9,982.68 and S$4,900 at the exchange rate of 2.2540) per month as his living and/or day to day expenses from January 2007 until final disposal of this suit;

(f) permitting the fourth defendant to allow the arrangement for settlement of the monthly instalment on the house bearing the address at 64, The Vale, London NW11 8SJ up to the extent of £3,200;

(g) permitting the fourth defendant to allow the deduction of the fourth defendant's EPF in the sum of RM30,000 on March 2007 and June 2007 in account for Public Mutual Unit Trust;

(h) permitting the fourth defendant to dispose of shares in his account with SJ Securities Sdn Bhd from time to time at market price and to remit the sales proceed (after deduction of commission) to the fourth defendant's account in Malaysia;

(i) excluding the shares in the fourth defendant's account with SJ Securities Sdn Bhd owned by a third party namely Salawati bt Mat Salleh;

(j) permitting the defendants to pay legal fees as and when the need arises in defending legal actions involving the defendants and/or the financial obligations incurred by the defendants including but not limited to this action, the Kuala Lumpur Magistrates' Court Summons No 72–24902 of 2006 (10A), the Kuala Lumpur High Court Civil Suit No D3–22–609 of 2006, the Shah Alam High Court Originating Summons No MT1–24–821 of 2006 and the Kuala Lumpur High Court Civil Suit No D2–22–1085 of 2006; and

(k) permitting miscellaneous transactions involving dealings of assets overseas up to the value of USD1m in aggregate provided full disclosures is made within 14 days of such dealings.

FACTS

[49] The essential facts are these. On 1 April 2004, Pesaka, the first defendant, issued RM140m worth of ABBA bonds, which were purchased by the ten plaintiffs. The tenure of the bonds ranged from 1½ years to 2½ years, with the maturity dates being:

(a) 30 September 2005 (RM30m);

(b) 30 March 2006 (RM50m); and

(c) 30 September 2006 (RM60m).

[50] The bonds are governed by the four following contracts:

(i) a trust deed entered into between Pesaka and the second defendant ('Maybank Trustees') on 9 March 2004;

(ii) a subscription and facility agreement entered into between Pesaka and the third defendant on 9 March 2004;

(iii) a deed of assignment and charge entered into between Pesaka and Maybank Trustees on 9 March 2004; and

A (iv) a deed of assignment executed by Pesaka in favour of Maybank Trustees on 1 April 2004.

[51] The principal terms of the trust deed, insofar as they are material to these proceedings, are as follows:

B (a) Mayban Trustees is appointed trustee for each and every bondholder — cl 2.1;

(b) the Bonds are direct, secured and unconditional obligations of Pesaka — cl 3.1(a);

C (c) the trust deed binds all bondholders, present or future and the bonds are issued subject to the trust deed — cl 3.1(b);

(d) by way of a positive undertaking, Pesaka undertakes to open and maintain four designated accounts, and to make the necessary deposits into and to withdraw payments therefrom only in accordance with the provisions of the trust deed — cl 7.1(w);

D (e) by way of negative undertakings, Pesaka undertakes:

(f) not to make or grant any loan or advance to any of its directors or any other person or firm or organisation;

E (g) not to open and maintain any other accounts other than the designated accounts; and

(h) not to enter into any related transactions with any of its directors, shareholders or related corporations — cl 7.2(h), (m) and (q);

F (i) Mayban Trustees is to be the sole signatory to the disbursement, revenue and finance service reserve accounts and Pesaka the signatory to the operating account — cl 8;

G (j) all proceeds from three contracts entered into between Pesaka and the Government of Malaysia ('the government contracts') shall be deposited into the revenue account — cl 8.2(a)(i);

H (k) monies in the revenue account shall be applied to redeem the bonds — cl 8.2(b)(iii); and

(l) Pesaka undertakes to deposit into one of the designated accounts, namely the finance service reserve account, the minimum required balance to be applied towards the payment of any moneys due and I owing under the bonds — cl 8.3.

[52] By the terms of the deed of assignment and charge and by the deed of assignment executed by Pesaka in favour of Mayban Trustees, Pesaka assigned absolutely to Mayban Trustees, as security for the payment of the redemption

monies of the bonds, all its (Pesaka's) rights, present and future under the government contracts. A charge in favour of Mayban Trustees was also created by Pesaka thereunder.

[53] The opening and operating of the three Shariah compliant trustee accounts, with Mayban Trustees as sole signatory at all times, into which accounts trust monies would be deposited and which would (in the case of the revenue account) be earmarked and designated for the purpose of redeeming the bonds upon their maturity was a fundamental term of the issuance of the bonds.

[54] Pesaka failed to open the three Shariah compliant trustee accounts with Mayban Trustees as sole signatory. In consequence, when the proceeds of the bonds were disbursed by KAF Discounts Bhd ('the third defendant') on 1 April 2004, the bond proceeds were not paid into any Shariah compliant trustee accounts, operated solely by Mayban Trustees, but were paid to various accounts at Pesaka's instructions. None of these accounts were Shariah compliant and operated by Mayban Trustees as the sole signatory.

[55] What Pesaka did was to allegedly 'convert' three of its pre-existing corporate accounts into which the bond proceeds were credited into. Mayban Trustees was not the signatory to these three pre-existing accounts. The said accounts were also not Shariah compliant or based upon Islamic banking principles, as expressly required by the bond contracts. None of the bondholders had any knowledge at this point of time that the sale proceeds of the bonds of RM140m had not been deposited into the trustee accounts with Mayban Trustees as the sole signatory.

[56] On 30 September 2005 Pesaka failed to redeem the first tranche of bonds upon their maturity in the sum of RM34,202,500. In consequence, MARC, an independent rating agency, downgraded the bonds from A+ to D. Further, by letter dated 30 September 2005, Mayban Trustees declared an event of default on the part of Pesaka. This meant that the entire indebtedness of Pesaka became due and payable immediately rather than on the respective maturity dates of the second and third tranches.

[57] On 25 October 2005, during a meeting between the parties, Pesaka admitted that it had in fact received RM109m under the government contracts which were deposited into an account to which Mayban Trustees was not the signatory. Pesaka further admitted that out of this sum it had utilised RM62m for overseas investments in its related companies in Germany, South Korea and the United Kingdom. At the same meeting Mayban Trustees informed the plaintiffs that it had not become the sole signatory to the trustee accounts. It was also at this meeting that the plaintiffs

A discovered for the very first time that Pesaka had received RM109m under the government contracts from which RM62m was applied by Pesaka for foreign investments and that Mayban Trustees was not the sole signatory to the three trustee accounts.

B PROPRIETARY CLAIM

[58] Mr Tommy Thomas, counsel for the plaintiffs, submitted that a proprietary claim is sought by the plaintiffs against Pesaka in this suit. Pursuant to the express terms of the bonds contracts the proceeds of the C government contracts belong at all times in equity to the plaintiffs. It is an undisputed fact that Pesaka received the proceeds of the government contracts which were deposited into an account of which Mayban Trustees was not the signatory. Further, instead of using the proceeds of these D government contracts (which were trust monies, earmarked and designated for the sole purpose of redeeming the bonds upon maturity) to repay the plaintiffs and redeem the ABBA bonds, Pesaka, wrongfully and in breach of the bond contracts, and without the knowledge of the plaintiffs, utilised these monies for unauthorised purposes.

E

[59] Mr Tommy Thomas further submitted that the proceeds of the government contracts were dishonesty siphoned out by Rafie (the second respondent in this appeal), Murnina (the fifth defendant in the civil suit) and Pesaka (the first respondent in this appeal), in breach of the bond contracts, F in order to defeat the prior and legitimate claims of the plaintiffs and that the trust monies belonging in equity to the plaintiffs were channelled by Pesaka, Rafie and Murnina to companies related to them, including the Amdac companies. As the controlling and directing minds of Pesaka and the Amdac companies, Rafie and Murnina caused Pesaka to dishonestly and fraudulently G make the payments of the trust monies to Rafie and the Amdac companies. In consequence, all the knowledge of Rafie and Murnina acquired in dishonestly and fraudulently directing the affairs of Pesaka are attributed to each of the Amdac companies, which accordingly received all monies from Pesaka in circumstances of actual and/or constructive knowledge of the H dishonesty and fraudulent conduct of Rafie and Murnina. Therefore Rafie, Murnina and the Amdac companies are holding the monies received from Pesaka (and any assets or properties that were purchased from the application of such monies) in constructive trust for the benefit of and on behalf of the plaintiffs, which the plaintiffs are entitled to trace.

I

[60] In support of the plaintiffs' case of a proprietary claim Mr Tommy Thomas cited the following cases:

(i) *Re Kayford Ltd* [1975] 1 All ER 604;

(ii) *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378; and

(iii) *Foskett v McKeown* [2001] 1 AC 102.

[61] In response to that Mr Lim Kian Leong, counsel for the respondents submitted that the plaintiffs are stretching the Mareva order beyond its original purpose so that instead of preventing abuse the plaintiffs are using it to secure payment of a judgment that yet to be obtained in this action. Further, by claiming that the defendants' funds are trust monies, the plaintiffs have jumped the gun by concluding that they are entitled as claimed and avoided the tracing process.

[62] Mr Lim Kian Leong further submitted that the defendants did not operate their businesses from scrap with the funds raised from ABBA bonds. The defendants already had substantive ongoing businesses before the ABBA bonds issue arose. Therefore even if the defendants are eventually found liable to pay the plaintiffs as claimed (which is denied) and those monies from the ABBA bonds and the revenue thereon are adjudged as held on trust for the plaintiffs (which is denied), the plaintiffs still need to trace and segregate the sources of the defendants' monies as there has been admixture with the defendants' existing monies and assets prior to the issuance of ABBA bonds.

[63] According to Mr Lim Kian Leong in the case of *SCF Finance v Masri* [1985] 1 WLR 876, the English Court of Appeal set down certain guidelines for the purpose of making determination when there is a dispute as to whether the assets which the order sought belong to the defendant and one of the guidelines is as follows:

> (1) Where a plaintiff invites the court to conclude within the scope of a Mareva Injunction assets which appear on their face to belong to a third party, eg a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant...

The proposition in the aforesaid case was accepted and adopted by our court in the case of *Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors* [2003] 5 MLJ 233.

[64] Based on the above Mr Lim Kian Leong submitted that the same test can be applied here ie unless the plaintiffs can show strong proof and evidence that those monies are held on trust for their benefit (which is denied by the defendants) the monies and assets in the name of the defendants must be accepted by this court to be monies and assets belonging to the defendants.

A **[65]** Mr Lim Kian Leong also submitted that the primary subscriber of the ABBA bonds were KAF Discounts Bhd and Kenanga as stated in the plaintiffs' statement of claim. As such the funds that came into the hand of Pesaka never belong to the plaintiffs. There was no direct contract between the plaintiffs and Pesaka.

B

[66] In my view it is important in this appeal to decide whether the plaintiffs, from the affidavit evidence, have made out a strong case of proprietary claim against the defendants. There is no dispute that the entire indebtedness of Pesaka became due and payable immediately when Pesaka C failed to redeem the first tranche of the bonds upon their maturity. Pesaka also admitted that it had in fact received RM109m under the government contracts which were deposited into an account of which Mayban Trustees was not the signatory. Pesaka further admitted that out of this sum it had utilised RM62m for overseas investments in its related companies in D Germany, South Korea and the United Kingdom. It must be noted that under the trust deed Pesaka had given an undertaking that the proceeds from the government contracts would be deposited into the revenue account of which Mayban Trustee was to be the sole signatory and the monies in the revenue account would be applied to redeem the bonds.

E

[67] Rafie and Murnina were the controlling directors of Pesaka and the Amdac companies. As such I agree with the plaintiffs that when Pesaka made payments from that RM109m to Rafie and the Amdac companies, in the circumstances, had the actual or constructive knowledge of the dishonesty F and fraudulent conduct of Rafie and Murnina in dealing with the proceeds of the government contracts.

[68] In *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 the plaintiff airline appointed as its agent a company of which the G defendant was the managing director and principal shareholder. Under the agency agreement, the company was to hold in trust for the airlines agency monies until it was accounted for by the company to the airline. With the defendant's knowledge and assistance, the company paid the money into its current bank account instead of into a separate account, and in breach of H trust the company used that money for its own business purposes. The company failed to pay to the airline sums due within the time specified by the agreement. The airline terminated that agreement and the company became insolvent. The plaintiffs commenced proceedings against the defendant to recover the money owed by the company. The judge held that the defendant I was liable as constructive trustee to pay the amount to the airline, which decision was upheld by the Privy Council.

[69] Similarly in the instant case the money, ie RM109m, belongs beneficially to the plaintiffs as that money was supposed to be used to redeem the bonds. As such I was of the view that from the affidavit evidence the plaintiffs have shown that they have a strong case of proprietary claim against the defendants.

[70] It is also to be noted that among the reliefs the plaintiffs are seeking in their statement of claim are:

(i) a declaration that all the assets and properties of the Mareva defendants belong in equity to the plaintiffs; and

(ii) an order that all the assets and properties of the Mareva defendants be traced, and thereafter applied to discharge the indebtedness of Pesaka to the plaintiffs.

In *Foskett v McKeown* [2001] 1 AC 102, the House of Lords had to deal with a trustee who fraudulently applied trust monies for his own benefit. At p 127 Lord Millett laid down the following principle of tracing:

> A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bone fide purchaser for value without notice.

In the instant case Pesaka had wrongfully misappropriated the proceeds from the government contracts and used them for the benefit of Rafie and the Amdac companies. Under the equitable tracing rules the plaintiffs are therefore entitled to assert their beneficial rights over the remaining money and its traceable proceeds held by Rafie and the Amdac companies. As such, even though the court has not yet decided the plaintiffs' claims against the defendants, I was satisfied that based on the affidavit evidence the plaintiffs have also shown a well-founded case of tracing in equity against the defendants.

VARIATION

[71] Having analysed the plaintiffs' case as set out above I then proceeded to decide the crux of this appeal, that is to say, whether the learned High Court judge was right in her decision in making the variation orders. I was mindful of the facts that the orders appealed from were made in the exercise of a discretion vested in the learned judge and under the circumstances the function of this court was one of review only. However as the learned judge did not provide her grounds of judgment and the notes of proceedings had not been made available, in my view, the correct approach to be taken in this appeal was to decide the matter as if this court was exercising its original discretion.

[72] The purpose of a Mareva order has been clearly stated in a number of cases. In *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 Abdoolcader FJ said at p 64:

> It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three. In *PCW (Underwriting Agencies) Ltd v Dixon & Anor* which sets out the policy underlying the Mareva jurisdiction, it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. This decision of Lloyd J went on appeal to the Court of Appeal ([1983] 2 AII ER 697) which however did not deliver a judgment but by consent allowed the appeal and varied the judge's order, but the principles enunciated by Lloyd J were unaffected by the factual circumstances of that case. The English Court of Appeal has also held in *Campbell Mussells & Ors v Thompson & Anor* [The Times, 30 May 1984], that a Mareva injunction was never intended to put a plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits.

[73] In *Law of Banker and Customer* (4th Ed) by Poh Chu Chai the learned author made the following comment at p 482:

> A Mareva injunction is intended to assist a plaintiff in preserving the assets of a defendant when there is a real risk that the defendant might remove or dissipate his assets so as to avoid satisfying a judgment which might be obtained by the plaintiff. The injunction is, however, not intended to give a plaintiff priority for his claim over that of other creditors of the defendant. Neither is it intended to interfere with a defendant's legitimate business. A defendant against whom a Mareva injunction has been granted is entitled to apply to the court to vary the injunction for the purposes of enabling him to make a bone fide payment of expenses incurred in the ordinary course of business. In *Iraqi Ministry Defence v Arcepey Shipping Co SA*, it was decided by Goff J that a Mareva injunction was not intended to preclude a defendant from making a genuine payment of his debts to other creditors.

[74] Mr Tommy Thomas agreed that in a typical Mareva case a party subject to a Mareva order is allowed to have resort to frozen funds in order to finance his defence and for his ordinary expenses because the monies belong to him until trial and judgment. However it was the contention of Mr Tommy Thomas that there was an exception to this rule in cases where the assets on which the Mareva defendant wishes to rely to finance his litigation and ordinary expenses are not his but represents money (or other asset) which is held on trust for the plaintiff. According to him in such cases the court have refused to vary the Mareva order and have denied the Mareva defendant

access to the frozen funds in order to finance his defence or for his ordinary expenses because such monies never belonged in equity to the defendant. In support of that he cited the following cases:

(a) *Barclays Bank Plc v G Thorpe, R Thorpe and Chase Manhattan Bank NA* [1995] JLR 184;

(b) *United Mizrahi Bank Ltd v Doherty & Ors* [1998] 2 All ER 230.

[75] In *Barclays Bank Plc v G Thorpe, R Thorpe and Chase Manhattan Bank NA* an application for a Mareva injunction to be varied to make allowance for living expenses and legal costs was dismissed by the Jersey Court which drew a distinction between the usual Mareva case and one arising out of a proprietary claim by relying upon a judgment of Bingham MR in the English Court of Appeal case of *Sundt Wrigley & Co Ltd v Wrigley* [1993] CA Transcript 685. In that case Bingham MR said:

> In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence.
>
> In the proprietary case however, the judgment is a more difficult one because in the plaintiff's contention the money on which the defendant wishes to rely to finance his litigation is not the defendant's money at all but represents money held on trust for the plaintiff. That of course, gives rise to an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence.
>
> As these authorities make plain, a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence.
>
> In the exceptional case where a proprietary claim is made to enjoined funds and the plaintiff is able within the reasonable confines of an interlocutory hearing to demonstrate a strong probability that the proprietary claim is well-founded then that may properly affect the court's decision whether the defendant should be free to draw on those funds to finance his defence. Given the court's traditional tendency to protect the integrity of a trust fund, that is a fact which in such circumstances need not, and indeed probably should not, be ignored.

[76] With regard to *Barclays Bank*'s case Mr Lim Kian Leong submitted that that case could be distinguished and was not applicable to the instant case on the following grounds:

(i) there was clear evidence that the monies which were in the defendants' accounts at Chase Manhattan Bank were monies belonging to the plaintiff and whereas in the present case the plaintiffs have yet to establish their alleged proprietary claim against the defendants; and

(ii) there was no necessity to allow any variation of the Mareva injunction, as the defendants' legal representation was not jeopardised as they were entitled to legal aid, and in the present case, the defendants are entitled to such variation to ensure their legal representation in defending the civil suit initiated by the plaintiffs.

[77] It must be noted that in the instant case the order relating to the legal costs was no longer an issue as the plaintiffs had consented to that application. I was not unmindful of the fact that in the instant case the plaintiffs have not obtained judgment against the defendants yet but as I have ruled earlier the plaintiffs have shown that they have a well-founded case of proprietary claim and tracing in equity against the defendants.

[78] In *United Mizrahi Bank Ltd v Doherty* the plaintiff's bank claimed that the funds which the first defendant had wrongfully obtained from its customers had been siphoned off to offshore entities and had ended up in the hands of his wife (the fifth defendant) and certain companies. The funds were then used for the purchase of properties which became the subject matter of the bank's application to the court for breach of trust against the first defendant, and a constructive trust and tracing claim against the other defendants. The court again relied upon the judgment of Bingham MR in *Sundt Wrigley & Co Ltd v Wrigley* and in applying the principles laid down therein, dismissed the defendants' notice of motion seeking the court's sanction that the disposal of certain assets for the purpose of funding their reasonable legal costs could not thereafter be a continuation or perpetuation of a breach of trust or constructive trust as against the bank.

[79] With regard to that case Mr Lim Kian Leong submitted that that case did not support the plaintiffs' argument because in that case the court had allowed certain allowances for living expenses and legal costs to be expended on the defendants. In my view what was more important from the decision of the above two cases relied upon by Mr Tommy Thomas was the readiness of the courts to apply the principles of law laid down by Bingham MR in *Sundt Wrigley & Co Ltd v Wrigley*. In both cases the court accepted and applied the principles laid down by Bingham MR. I do not know of any local case in which the principles of law laid down by Bingham MR in that case had been considered and applied.

[80] As opposed to that there was a decision of Lloyd J in *PCW (Underwriting Agencies) Ltd v Dixon and another* [1983] 2 All ER 158. In that case the plaintiffs obtained, inter alia, a Mareva injunction over the whole of the defendant's asset within the jurisdiction save that he was permitted to draw reasonable living expenses not exceeding £100 per week. The defendant applied for a variation of the injunction on the ground that he needed £1,000

per week for reasonable living expenses and that he needed £77,500 to meet outstanding debts and pay legal expenses. The plaintiffs contended, inter alia, that the plaintiffs were laying claim to a trust fund which should be preserved so that if the plaintiffs were successful in the action they could have recourse to that fund by tracing in equity. At p 164 Lloyd J said:

> The distinction between the ordinary Mareva plaintiff (to use Ackner LJ's phrase) and the case where the plaintiff is laying claim to a trust fund on the so-called wider ground, is thus clear. In the latter case the whole object is to secure the trust fund itself so that it should be available if the plaintiff should prove his claim. In the former case by contrast the plaintiff is not entitled to any security. The purpose of the jurisdiction, as is now clearly established, is not to provide the plaintiffs with any form of pre-trial attachment. It is simply to prevent the injustice of a defendant removing or dissipating his assets so as to cheat the plaintiffs of the fruits of his claim.
>
> Can the plaintiffs then bring the present case within the wider jurisdiction? I have grave doubts. Both in *A v C* and *Chief Constable of Kent v V* the claim related to specific identifiable bank accounts. It is difficult to regard the whole of the man's assets as a fund in that sense, even though his assets may in part contain or be derived from money improperly come by. But even if I could regard the whole of the defendant's assets as a trust fund, I would be quite unwilling to uphold the ex parte order in the present case on that basis. All injunctions are, or course, in the end discretionary. I would regard it as unjust in the present case if the defendant were compelled to reduce his standard of living, to give up his flat or to take his children away from school, in order to secure what is as yet only a claim by the plaintiffs. I would regard it as even more unjust that he should be prevented from defending himself properly (for that is what it would amount to), merely because the plaintiffs say that in doing so he is using somebody else's money.

[81] It must also be noted that *Sundt Wrigley & Co Ltd v Wrigley* was the decision of the English Court of Appeal and it was decided in 1993 whereas *PCW (Underwriting Agencies) Ltd v Dixon* was decided by the Queen's Bench Division in 1983. I had carefully considered the two sides of the argument and I agreed with the principles of law stated by Bingham MR. In the instant case the plaintiffs are the beneficial owners of, inter alia, the proceeds of the government contracts and would therefore suffer injustice if successful at trial because they would then have financed the expenses of the Mareva defendants. I have ruled earlier that the plaintiffs' proprietary claim was well-founded. A review of the variation orders made by the High Court would indicate that the Mareva defendants had been permitted by the High Court to spend in excess of RM10m. That was not the end of the matter as, according to Mr Tommy Thomas, the Mareva defendants were applying for further variation orders to the High Court after that. Under the circumstances it would be unconscionable to allow the defendants to continue using the trust money.

[82] For the reasons stated above I was of the view that the Mareva defendants' application to vary the Mareva injunction should be dismissed. Accordingly I allowed the appeal by the plaintiffs with costs.

[83] My learned brother James Foong JCA has seen this judgment in draft and has expressed his concurrence.

Appeal allowed with costs.

Reported by K Nesan